



Office of the Attorney General
State of Texas

December 11, 1998

DAN MORALES
ATTORNEY GENERAL

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR98-3061

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120386.

The Texas Department of Transportation ("TxDoT") received a request for information relating to a certain highway intersection project. You seek to withhold portions of the requested information under section 552.103(a) of the Government Code, the "litigation exception."

Initially, we note that you did not submit your request for a decision from this office within ten business days of your receipt of the request for information. Normally, a governmental body must raise an otherwise applicable exception to required public disclosure within ten days following the governmental body's receipt of an open records request. See Gov't Code § 552.301(a). This office usually will not consider an exception raised after the initial ten days unless there exists a compelling reason for doing so. Open Records Decision No. 515 at 6 (1988).

You inform us that TxDoT received the request from Gary Janssen on July 22, 1998, and on July 31 "sent Mr. Janssen a letter that contained some of the requested information and informed him that the documents would be available upon payment of reproduction costs." You advise that, to date, Mr. Janssen has not paid such costs and picked up the documents, but that on September 10, 1998, another individual sent TxDoT a notice of claim in compliance with the Tort Claims Act, Civil Practice and Remedies Code § 101.101 *et seq.*, in regard to an accident at the intersection which was the subject of Mr. Janssen's request. You contend that TxDoT thus has a reasonable expectation of litigation to which the information requested by Mr. Janssen on July 22 relates and that the information so far not obtained by Mr. Janssen pursuant to that request may accordingly be withheld under section 552.103(a).

We assume good faith on the part of TxDOT in attempting to provide Mr. Janssen the information responsive to his July 22 request. *See* Gov't Code § 552.228(a) ("it shall be a policy of a governmental body to provide a suitable copy of public information within a reasonable time after the date on which the copy is requested."); § 552.261 *et seq.* (costs for providing copies of information). Based on your representations, we find TxDOT has demonstrated a compelling reason to overcome the presumption of openness. Consequently, we will consider the applicability of section 552.103(a) to the information at issue.

Section 552.103(a), excepts from disclosure information relating to litigation to which the governing body is or may be a party. A governmental body claiming the protection of section 552.103(a) has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable. It must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990). Based on your representations and our review of the information at issue, we conclude that you may withhold the information at this time under section 552.103(a).

We assume, however, that none of the information in the records at issue has previously been made available to the opposing party in the anticipated litigation. To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349(1982), 320 (1982). Similarly, section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 120386

Enclosures: Submitted documents

cc: Mr. Gary Janssen
Attorney at Law
10260 Westheimer, Suite 590
Houston, Texas 77042-3129
(w/o enclosures)